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12

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

13 COREY GERWASKI,

14 Plaintiff,

15 v.

16 STATE OF NEVADA, ex rel. BOARD
17 OF REGENTS of the NEVADA
18 SYSTEM OF HIGHER EDUCATION,
19 on behalf of the UNIVERSITY OF
20 NEVADA, LAS VEGAS; KEITH
WHITFIELD, individually; AJP
EDUCATIONAL FOUNDATION INC.,
a California Non-Profit Corporation;
STUDENTS FOR JUSTICE OF
PALESTINE-UNLV; NATIONAL
STUDENTS FOR JUSTICE OF
PALESTINE; NEVADANS FOR
PALESTINIAN LIBERATION;
DOES I-XX and ROE entities I-XX,

21 Defendants.

22 Case No.: 2:24-cv-00985-APG-MDC

23

**DEFENDANT KEITH WHITFIELD'S
MOTION TO DISMISS**

24

Keith Whitfield moves to dismiss this case under FRCP 12(b)(5) because
plaintiff failed to timely effect service of process within 90 days of the filing of his
complaint. The case should also be dismissed because Whitfield is entitled to
immunity under the Eleventh Amendment and to qualified immunity. Further,
plaintiff's claims I through XI should be dismissed as he lacks standing to assert them.

1 Finally, the case should be dismissed under Fed. R. Civ. P. 12(b)(6) because plaintiff
 2 fails to state a claim against Whitfield.

3 Dated September 18, 2024.

4 /s/ Andrew D. Smith
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9 **Points and Authorities**

10 **I. Introduction**

11 The Nevada System of Higher Education (NSHE) and the University of Nevada,
 12 Las Vegas (“UNLV”) are committed to the free speech and free exercise rights of all
 13 members of the university community. Shortly after the horrific events of October 7,
 14 2023, NSHE condemned the senseless acts of violence in Israel. In a statement,
 15 NSHE’s Chancellor wrote:

16 **Across NSHE, we will continue to provide support to
 our students and colleagues, respecting the widely
 different views of the Israeli-Palestinian conflict, but
 letting it be known that incidents of targeted
 harassment, direct threats, or the creation of
 pervasively hostile environments for vulnerable
 populations will not be tolerated.** Our institutions will
 17 remain steadfast in our commitment to providing safe and
 18 inclusive learning environments during these particularly
 19 challenging times when our commitment to mutual respect
 20 and support are tested.

22 Whitfield Decl., ¶12 Ex. A to the Declaration,

23 Echoing those sentiments at UNLV, President Whitfield wrote to the campus
 24 community:

25 The atrocities committed against civilians, including
 Americans, by Hamas in Israel over the weekend were
 26 reprehensible and has resulted in growing heartbreak, shock,
 27 and outrage. **There is simply no justification for the
 abhorrent acts from those that will kill vulnerable**

civilian men, women, and children. . . .

I know and fully appreciate that emotions are running high, but our university community must remain respectful, kind, and considerate of each other. Civility and thoughtful expression are key parts of peaceful discourse in higher education.

Whitfield Decl., ¶13, Ex. B to the Declaration.

Plaintiff brings this action against Whitfield in either his individual or official capacity. The complaint must be dismissed. To date, plaintiff has failed to timely serve any of the defendants in this action. As to Whitfield, service was not only untimely but also ineffective because plaintiff left papers on the threshold of Whitfield's house after his pet sitter refused to accept the papers from the process server. Further, Whitfield is entitled to both Eleventh Amendment immunity and qualified immunity from suit because plaintiff fails to allege that Whitfield violated plaintiff's clearly-established constitutional rights. Finally, plaintiff fails to allege sufficient facts against Whitfield to state a claim against him. All of these circumstances warrant dismissal.

II. Statement of Facts as to Service of Process

On May 26, 2024, plaintiff filed his *Complaint* against Whitfield. [ECF 1].

On August 9, 2024, plaintiff filed his *First Amended Complaint* to add an employment claim under Title VII. [ECF 6].

Under Fed. R. Civ. P. 4 (“Rule 4”), plaintiff was required to effect service of process 90 days from the filing of his initial pleading, which was no later than August 24, 2024.

Plaintiff did not effect timely service on any defendant. The attempted service of Whitfield was not effective.

Untimely and Ineffective Service on Whitfield

Plaintiff named Whitfield as a defendant. [ECF 6, ¶12]. Whitfield is an employee of NSHE. [ECF 6, ¶12]. It is unclear whether or not plaintiff sued him in his official capacity as president of UNLV, individually, or both.

1 Plaintiff's process server says she served the summons and complaint on
 2 "Erica," a co-occupant residing at Whitfield's home, at 7:26 p.m. on August 28, 2024.
 3 [ECF 9].

4 Whitfield resides at 6850 Hidden Sunset Lane, Las Vegas, NV 89120. Whitfield
 5 Decl., ¶4. He lives alone. Whitfield Decl., ¶4.

6 Whitfield left town on August 28 before the process server arrived at his house.
 7 Whitfield Decl., ¶5. While he was away, he had a colleague, Ericka Smith, come to his
 8 house to take care of his dog. Whitfield Decl., ¶6.

9 Smith does not reside at Whitfield's house. Whitfield Decl., ¶9; Smith Decl., ¶4.

10 On August 28, 2024, while at Whitfield's house, Smith greeted a process server
 11 through the front door. Smith Decl., ¶8. She informed the process server that
 12 Whitfield was not home and that she was just there to take care of Whitfield's dog.
 13 Smith Decl., ¶6-10. She did not open the screen door nor did she accept any papers
 14 from the process server. Smith Decl., ¶8-9. Later, when she was leaving, she found on
 15 the front door steps a copy of the summons and amended complaint. Smith Decl., ¶11.

16 **III. Statement of Facts¹**

17 Plaintiff is a student at UNLV. ¶217. Plaintiff is a devout Jew and wears a kippah
 18 at all times. [ECF 6, ¶219]. He is a member of the Consolidated Students of the
 19 University of Nevada, Las Vegas (CSUN), UNLV's undergraduate student government.
 20 [ECF 6, ¶225].

21 Plaintiff alleges discrimination and hostility in his role in CSUN. [ECF 6, ¶227].
 22 An advisor for CSUN was visibly upset learning he was a conservative candidate
 23 running for office. [ECF 6, ¶227]. The advisor spoke to a CSUN officer to dissuade people
 24 from supporting him for office, telling people she did not want him to win. [ECF 6, ¶227].

25
 26
 27 ¹ The facts are taken from plaintiff's amended complaint, which must be treated as true
 28 for the purposes of this motion. Whitfield disputes plaintiff's version of the facts.

1 A resolution he collaborated on did not move forward due to the advisor's intervention
2 without a valid reason. [ECF 6, ¶227]. The advisor said that plaintiff makes women feel
3 defensive because he is a "white male of large size." [ECF 6, ¶227]. The advisor
4 encouraged the student body president to file impeachment charges against nine
5 Senators, including plaintiff, for discussing a candidate via G-Chat in violation of
6 Nevada Open Meeting Law. [ECF 6, ¶227]; Whitfield Decl. Ex. C. The advisor disclosed
7 FERPA-protected credit information about plaintiff to another student. [ECF 6, ¶227].
8 The advisor encouraged another student to spread false accusations of racism and
9 homophobia about him across campus. [ECF 6, ¶227]. Other students have told plaintiff
10 that the advisor dislikes him because he is "a conservative Jew." [ECF 6, ¶229]. "Many
11 members of [CSUN] are pro-Palestine and have verbally attacked plaintiff and treated
12 him poorly due to his identity a kippa-wearing Jew." [ECF 6, ¶230].

13 Plaintiff struggled academically, failing two classes due to stress. [ECF 6, ¶231].
14 Plaintiff "has been effectively exiled from the Senate chambers because of his Jewish
15 identity." [ECF 6, ¶231].

16 In June 2023, plaintiff was asked questions about his Jewish heritage and sexual
17 orientation when he began working at the campus library. [ECF 6, ¶218].

18 In August 2023, plaintiff was terminated from his position at the library. [ECF 6,
19 ¶222].

20 Plaintiff does not allege any facts of the disparate treatment by his supervisors.

21 "On October 7, 2023, Hamas had killed 1,200 people and abducted over 200 more
22 including American citizens, still being held by Hamas as hostages." [ECF 6, ¶154].
23 Hamas is a terrorist organization. [ECF 6, ¶150].

24 "Shockingly, numerous students and faculty members at UNLV celebrate, justify,
25 and excuse Hamas's mass rape, murder, and kidnapping. Many have resorted to
26 harassment and even violence against Jewish students in support of Hamas's attack
27 and in condemnation of Israel's defensive response. UNLV faculty members and
28

1 Administration publicly support these students and oppose even the smallest measures
2 to combat UNLV's antisemitism." [ECF 6, ¶156].

3 "UNLV has allowed non-student organizations like Nevadans for Palestinian
4 Liberation, Red Desert Collective and Fifth sun Project to attend student rallies and
5 harass UNLV's students." [ECF 6, ¶159].

6 On November 17, 2023, UNLV leadership met with Jewish students and
7 community members from local Jewish groups to hear their concerns. [ECF 6, ¶¶ 169–
8 75].

9 Plaintiff did not attend the meeting.

10 On December 1, 2023, plaintiff spoke during public comment at the meeting of
11 the Board of Regents to express his concerns about antisemitism. [ECF 6, ¶176].

12 In December 2023, plaintiff returned to the library to study when the individual
13 who fired saw him as a threat and called the police. [ECF 6, ¶223].

14 On January 22, 2024, the CSUN Senate held a meeting at which Whitfield
15 attended to discuss the December 6, 2023 shooting at UNLV. [ECF 6, ¶234]. Plaintiff
16 told Whitfield at the meeting "that students needed faculty help in fighting antisemitism
17 and writing a resolution." [ECF 6, ¶234]. "Whitfield said that was not something faculty
18 should do to fix the tension between Jewish and Muslim students." [ECF 6, ¶235].
19 Plaintiff then requested Whitfield bring together the two groups to facilitate a peaceful
20 resolution, to which Whitfield replied that such action should come from the students
21 and not UNLV. [ECF 6, ¶236].

22 In February 2024, plaintiff reached out to Whitfield and another employee "to
23 explain that he felt targeted for being Jewish" without a response. [ECF 6, ¶237].

24 On February 27, 2024, a visiting Israeli physics professor delivered an open
25 lecture about black holes, as part of a public physics symposium when he was
26 interrupted by protesters voicing their views about the ongoing conflict in Gaza. [ECF 6,
27 ¶177]. The lecture ended due to the interruption by the protesters. [ECF 6, ¶178].

1 Plaintiff was not in attendance.

2 "In March 2024, plaintiff made formal complaints to the Board of Regents about
3 the antisemitism he was experiencing, but never heard back from anyone regarding
4 same." ¶238.

5 In a March 5, 2024 email to Whitfield, plaintiff, in part, wrote:

6 I am reaching out to bring to your attention a concern that has
7 arisen within the student-governed senate. As both the chair
8 of the scholarship and grants committee and a senator for the
School of Engineering, your insight and guidance would be
invaluable in this matter.

9 It has come to my attention that there may be instances where
10 our advisors are potentially exceeding the boundaries of their
roles by self-nominating faculty members to act as attorney
generals.

11 among many other things I'm currently being targeted and
12 attacked for my religious affiliation by an csun advisor. I have
13 gone through all the proper procedures however it is getting
worse. Csun advisors are openly spreading misinformation
about my faith credits and background to students. Violating
my confidentiality as a student and a student Body senator.

15 This situation raises concerns regarding the proper conduct
16 and the intended student governance structure.

17 I would greatly appreciate your advice on how we should
18 proceed to address this issue, ensuring the integrity of our
student senate's operations. As well as maintaining the
security and protection of students on campus

19 ¶239. Whitfield Decl. ¶14, Ex. C to the Declaration.

20 In May 2024, organized protests demanded UNLV divest in any companies that
21 deal with Israel. ¶189. The protesters chanted various slogans. ¶191.

22 Whitfield met with Students for the Justice of Palestine to hear their concerns as
23 he had like meetings with UNLV Jewish faculty group and the Hillel student group.
24 ¶¶195–96.

25 On May 11, 2024, UNLV held commencement at which a student gave a speech
26 that was not approved. ¶201. On June 2, 2024, Whitfield sent an email to the university
27 community that, in part, states:

1 Commencement is the absolute best part of my job and a truly
2 unique and uplifting experience at UNLV. It's a chance to
3 highlight the enormous success of our students alongside their
families, friends, and the entire Rebel community.

4 Unfortunately, what should have been a celebration for all in
5 attendance has become the focus of scrutiny because of
6 remarks shared during one of the speeches. A student speaker
7 at UNLV's morning commencement changed their speech
from what was originally submitted in advance of the
ceremony. I am disappointed by what I believe was an intent
of deception and to mislead. That is not the Rebel way, nor do
such actions represent the values we embrace as a university.
The vast majority of UNLV graduates will be joining
professions that have codes of conduct which they will be
mandated to follow or face reprimands and discipline that will
dictate their ultimate success or failure.

10 Protecting free speech and academic freedom is something
11 that I am very serious about upholding. However, we are all
12 responsible for what we say, when we say it, what venue we
choose to say it in, and how it may impact others. The
guidelines and policies we have in place are important
standards to ensure every individual is afforded the dignity
and respect this milestone celebration demands.

14 I understand that the words spoken during the
15 commencement ceremony were hurtful to some graduates and
others in attendance, and I want to make it clear that this
16 speech does not represent the views of this university.

17 I hope this is a lesson not lost on our students, faculty, or staff,
18 as it is one that I have taken to heart too. It reminds me that
I must do better in making clear my intentions and the
expectations we have for the members of our campus
community. Not in an effort to silence anyone – but to ensure
everyone feels welcome and can be heard in the proper forums.
I believe this is a teaching moment we all can learn from.

21 I will be reviewing our process to select our student speakers
22 as well as other university policies to ensure that we maintain
the celebratory spirit of commencement for our graduates and
their families and friends.

23 Additionally, I will look for and be open to educational
24 opportunities for our campus community. That is what we do
and who we are – it is central to our mission to provide an
academic forum for discourse on matters of importance to our
25 students and our campuses.

26 In that same spirit, I met with several groups near the end of
27 the spring semester regarding the ongoing conflict in Israel
and Gaza to hear their concerns and perspectives. Some have

1 criticized me for my open-door policy. And some have made
 2 assumptions and misrepresentations in the media or
 3 elsewhere.

4 This includes an (incorrect) assertion that UNLV will disclose
 5 our investments with any ties to Israel or that we would
 6 consider divesting from those investments. We will not. I will
 7 not.

8 As a life-long educator, I do feel that dialogue often provides
 9 an opportunity for better understanding and learning. That
 10 doesn't mean I agree with everything shared or said in these
 11 meetings, but I do take very seriously the concerns of any
 12 student who feels unsafe or marginalized. There is absolutely
 13 no room on our campuses for that.

14 UNLV is an academic institution that represents the diversity
 15 in the State of Nevada. We have policies in place regarding the
 16 use of venues and the opportunities to exercise First
 17 Amendment rights on our campus, and I expect everyone to
 18 adhere to these rules. We will not tolerate any form of
 19 prejudice, discrimination, threatening behavior, harassment,
 20 bullying, or intimidation of members of our university
 21 community that disrupt education on our campus. Any
 22 student, faculty, or staff member that experiences such
 23 behavior is encouraged to report it so that it may be addressed.
 24 I will not hesitate to get our university police involved to
 25 ensure the safety and security of everyone on our campuses.

26 I encourage everyone to take some time this summer to reflect,
 27 as I will, on ways in which we can build on our core values as
 28 a university, find common ground, and begin the new
 academic year stronger and more focused on our shared
 mission.

¶¶202–205; Whitfield Decl., ¶16, Ex. E to the Declaration.

Plaintiff asserts he's been under severe emotional strain from the distress of
 being accosted by antisemitic protestors. ¶209.

On July 8, 2024, Whitfield announced the launch of an expanded anti-bias and
 anti-discrimination education and training program for UNLV's employees. Whitfield
 Decl., ¶17, Ex. F to the Declaration.

On August 8, 2024, plaintiff received a Right to Sue letter from the EEOC. ¶221.

IV. Dismissal is Proper Due to Untimely and Insufficient Service

This argument consists of two parts: First, the attempt at service on Whitfield
 was untimely because it was not done within 90 days of the filing of the Complaint, as

1 required by Rule 4(m). Second, the attempt did not accomplish service under any
 2 potentially applicable provision of Rule 4. Rule 4(j) governs service on a defendant who
 3 is sued in his capacity as a state government employee. Rule 4(f) governs service on an
 4 individual in his individual capacity. It appears from the content of the Complaint that
 5 Rule 4(j) applies to Whitfield in this case, but service was ineffective under either
 6 subsection of the rule.

7 **Untimely Service**

8 Rule 4(m) requires that service be made by within 90 days from the filing of his
 9 complaint. Here, he was required to serve all defendants by August 24, 2024. He did not
 10 do so. The Court should therefore dismiss this action against Whitfield.

11 “A federal court does not have jurisdiction over a defendant unless the defendant
 12 has been served properly under [Rule] 4.” *Direct Mail Specialists v. Eclat Computerized*
Techs., Inc., 840 F.2d 685, 688 (9th Cir. 1988); *see also Murphy Bros., Inc. v. Mitchell*
Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) (“Service of process, under longstanding
 15 tradition in our system of justice, is fundamental to any procedural imposition on a
 16 named defendant.”). Where the validity of service is contested, the burden is on the
 17 party claiming proper service to establish its validity. *Cranford v. United States*,
 18 359 F.Supp.2d 981, 984 (E.D.Cal. 2005) (citing *Grand Entertainment Group, Ltd. v. Star*
 19 *Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993)). Assuming insufficiency of process
 20 or insufficiency of service of process, the Court has discretion to dismiss an action or
 21 simply quash service. *See e.g., SHJ v. Issaquah School District No. 411*, 470 F.3d 1288,
 22 1293 (9th Cir. 2006) (citing *Stevens v. Security Pac. Nat'l Bank*, 538 F.2d 1387, 1389
 23 (9th Cir. 1976)) (“the choice between dismissal and quashing service of process is in the
 24 district court’s discretion.”).

25 **Ineffective Attempt at Service**

26 Plaintiff failed to effect proper service on Whitfield either in his official or
 27 individual capacity relating to the performance of his duties as an NSHE employee.
 28

To properly serve an employee of NSHE in their official capacity, Rule 4(j)(2) requires a plaintiff to either (a) deliver a copy of the summons and of the complaint to the state-created governmental organization's chief executive office, or (b) serve a copy of each as required by Nevada law for serving a summons on such a defendant. Under applicable state law, Nev. Rev. Stat. 41.031(2) and Nev. R. Civ. P. 4.2(d), a plaintiff must serve both the Nevada Attorney General and the individual or someone designated by the individual to receive service. The Nevada state rule for service of process on state employees does not expressly permit substitute service, except upon someone specifically designated for that purpose.²

The rule is clear that service upon a government employee must be made by serving the employee's employer under federal law, or by serving the employee and the Attorney General under state law. Plaintiff has not complied with either option.

To properly serve an individual defendant outside of his or her role as a state employee, Rule 4(i) applies. A plaintiff must either (a) deliver a copy of the summons and of the complaint to the individual personally; (b) leave a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (c) deliver a copy of each to an agent authorized by appointment or by law to receive service of process. Fed. R. Civ. P. 4(e)(2). "Where substitute service is used, the person with whom the copy is left must also be a resident of the usual place of abode." *United States v. Rose*, 437 F. Supp. 2d 1166, 1172 (S.D. Cal. 2006).

Effect of Deficient Service

If a plaintiff fails to serve a defendant within the 90-day period, the court "must

² Plaintiff filed an Affidavit of Service on September 11, 2024, stating that the summons and complaint were served on the Nevada Attorney General's office. [ECF #11]. This is irrelevant to the question of service on Whitfield. The Affidavit of Service [ECF #11] expressly states that the documents were served upon "UNLV, Nevada System of higher Education C/O Attorney General Office." Whitfield was not the target of this service attempt. Furthermore, this attempt at service came after the deadline.

1 dismiss the action without prejudice against that defendant or order that service be
 2 made within a specified time.” FRCP 4(m). “But if the plaintiff shows good cause for the
 3 failure, the court must extend the time for service for an appropriate period.” *Id.* A
 4 showing of good cause means “at minimum excusable neglect,” and may also require a
 5 showing that “(a) the party to be served personally received actual notice of the lawsuit;
 6 (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely
 7 prejudiced if his complaint were dismissed.” *Almont Ambulatory Surgery Ctr., LLC v.*
 8 *UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110, 1186 (C.D. Cal. 2015) (cleaned up).

9 Regardless of whether or not plaintiff sued Whitfield either individually or in his
 10 official capacity, he failed to effect service within 90 days of the filing of his complaint.
 11 Plaintiff offers no evidence that he served the head of NSHE for the Court to acquire
 12 jurisdiction over Whitfield in his official capacity as president.

13 Further, plaintiff did not effect substitute service on Whitfield when the process
 14 server left papers at his front door while he was away. That is because Smith does not
 15 live at Whitfield’s home. Smith is not a co-occupant at Whitfield’s home. Smith was
 16 present only to take care of Whitfield’s dog while he was out of town. Smith told the
 17 process server these facts, which the process server ignored. She was not authorized to
 18 accept service, and she was not a proper person to receive substitute service.

19 Whitfield is prejudiced due to plaintiff’s failure to effect timely service because
 20 none of the other defendants in this action have been timely served, causing
 21 unnecessary delay and limiting his ability to defend against this action. If the Complaint
 22 is not dismissed, he would be the only defendant among five to be required to participate
 23 in this case.³ Plaintiff, on the other hand, would not be severely prejudiced if his
 24 complaint was dismissed because the statute of limitations has not yet run. Therefore,

25
 26 ³ Plaintiff filed an Affidavit of Service on September 10, 20204, indicating defendant AJP
 27 Educational Services was served on September 3, 2024 [ECF #10]. Whitfield’s counsel does not
 28 represent AJP Educational Services, but it should be noted this was also untimely.

1 the Court should dismiss this action against Whitfield because plaintiff failed to effect
 2 service within 90 days from the filing of his complaint.

3 **V. Eleventh Amendment Immunity Applies to Whitfield**

4 UNLV employees sued in their official capacities are entitled to Eleventh
 5 Amendment immunity. *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of*
 6 *Higher Educ.*, 616 F.3d 963, 968 (9th Cir. 2010). As the court reasoned:

7 “The Eleventh Amendment bars suits against the State or its
 8 agencies for all types of relief, absent unequivocal consent by
 9 the state.” *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir.
 10 1999) (citing *Pennhurst v. Halderman*, 465 U.S. 89, 100,
 11 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)). The
 12 Eleventh Amendment jurisdictional bar applies regardless of
 13 the nature of relief sought and extends to state
 14 instrumentalities and agencies. *See Papasan v. Allain*,
 15 478 U.S. 265, 276 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

16 Eleventh Amendment immunity also shields state officials
 17 from official capacity suits. *See Central Reserve Life of N. Am.*
Ins. Co. v. Struve (“Central Reserve”), 852 F.2d 1158, 1160–61
 18 (9th Cir. 1988). A narrow exception exists “where the relief
 19 sought is prospective in nature and is based on an ongoing
 20 violation of the plaintiff’s *federal* constitutional or statutory
 21 rights.” *Id.* at 1161 (emphasis in original); *see also Papasan*,
 22 478 U.S. at 277–78; *Indep. Living Ctr. of S. Cal., Inc. v.*
Maxwell-Jolly, 572 F.3d 644, 660 (9th Cir. 2009) (“[A] plaintiff
 23 may ... maintain a federal action to compel a state official’s
 24 prospective compliance with the plaintiff’s *federal* rights.”)
 25 (citations omitted).

26 *Krainski*, 616 F.3d at 967–68. Suits against state official in their official capacity are no
 27 different from suits against the state itself. *Id.* at 968. As such inclusion of the individual
 28 state officer may be dismissed as “a redundant defendant.” *Ctr. for Bio-Ethical Reform,*
Inc. v. L.A. Cnty. Sheriff Dep’t, 533 F.3d 780, 799 (9th Cir. 2008).

29 Here, plaintiff asks the Court to enjoin *other groups* from exercising their
 30 constitutional rights on UNLV’s campus—something the Court flatly cannot do.
 31 Plaintiff requests that the Court: “Permanently enjoin Defendants SJP-UNLV and
 32 NSJP from engaging in any campus activities, banning them from UNLV’s campus.”
 33 [ECF 6 at p. 76]. He further requests the Court “Permanent(ly) enjoin all non-student

1 organizations that violate NSHE student conduct and policies from engaging in any
 2 campus activities, banning them from UNLV's campus." *Id.* He does not request any
 3 prospective injunctive relief against Whitfield in his official capacity. Therefore, this
 4 case should be dismissed as to Whitfield.

5 **VI. Qualified Immunity Applies to Whitfield**

6 Whitfield is entitled to qualified immunity. In *Krainski*, the court held:

7 State officials are entitled to qualified immunity from suits for
 8 damages "insofar as their conduct does not violate clearly
 9 established statutory or constitutional rights of which a
 10 reasonable person would have known." *Harlow v. Fitzgerald*,
 11 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
 12 "Determining whether officials are owed qualified immunity
 13 involves two inquiries: (1) whether, taken in the light most
 14 favorable to the party asserting the injury, the facts alleged
 15 show the officer's conduct violated a constitutional right; and
 16 (2) if so, whether the right was clearly established in light of
 17 the specific context of the case." *al-Kidd v. Ashcroft*, 580 F.3d
 18 949, 964 (9th Cir. 2009) (citing *Saucier v. Katz*, 533 U.S. 194,
 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). "For a
 21 constitutional right to be clearly established, its contours must
 22 be sufficiently clear that a reasonable official would
 23 understand that what he is doing violates that right." *Hope v.
 Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666
 24 (2002) (internal quotation marks omitted). "It is within our
 25 'sound discretion' to address these two prongs in any sequence
 26 we see fit." *al-Kidd*, 580 F.3d at 964 (quoting *Pearson v.
 Callahan*, 555 U.S. 223, 129 S.Ct. 808, 818, 172 L.Ed.2d 565
 27 (2009)).

28 *Krainski*, 616 F.3d at 968.

29 Here, plaintiff does not allege any violations of a clearly established
 30 constitutional right committed by Whitfield. As such, Whitfield is entitled to qualified
 31 immunity and the Court should dismiss this action against him.

32 **VII. Plaintiff Lacks Standing**

33 Plaintiff lacks standing to prosecute claims that does not redress an injury to
 34 him. Plaintiff bears the burden to establish Article III standing for each of his claims
 35 and for the form of the relief sought. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–
 36 31 (2021); *Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021). First, he must show an
 37

1 injury in fact, which is "an invasion of a legally protected interest which is (a) concrete
 2 and particularized and (b) actual or imminent, not conjectural or hypothetical." *Weber*,
 3 2 F.4th at 844. The threatened injury must be certainly impending to be an actual or
 4 imminent injury. *Id.* It is insufficient to allege a possibility of future injury. *Id.* Plaintiff
 5 must be personally affected by the injury that is beyond the psychological consequence
 6 presumably produced by observation of conduct with which one disagrees. *Id.* Second,
 7 there must be a causal connection between the injury and the conduct complained of
 8 that is fairly traceable to the defendant and not the result of the independent action of
 9 some third party. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Third, plaintiff
 10 must show redressability. *Id.* at 561.

11 Here, aside from alleging termination from his employment at the library,
 12 plaintiff has failed to allege any concrete injuries. His claims

13 **VIII. Legal Standard for Failure to State a Claim**

14 Under FRCP 12(b)(6), a complaint must be dismissed if it fails to allege "enough
 15 facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,
 16 550 U.S. 544, 570 (2007). In ruling on a motion to dismiss, "[a]ll well-pleaded allegations
 17 of material fact in the complaint are accepted as true and are construed in the light
 18 most favorable to the non-moving party." *Faulkner v. APT Sec. Services, Inc.*, 706 F.3d
 19 1017, 1019 (9th Cir. 2013) (citations omitted).

20 To survive a motion to dismiss, a complaint need not contain "detailed factual
 21 allegations," but it must do more than assert "labels and conclusions" or "a formulaic
 22 recitation of the elements of a cause of action. . ." *Ashcroft v. Iqbal*, 556 U.S. 662, 678,
 23 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim will
 24 not be dismissed if it contains "sufficient factual matter, accepted as true, to state a
 25 claim to relief that is plausible on its face," meaning that the court can reasonably infer
 26 "that the defendant is liable for the misconduct alleged." *Id.* at 678 (internal quotation
 27 and citation omitted). For a complaint to survive dismissal, the plaintiff must allege
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1 non-conclusory facts that, together with reasonable inferences from those facts, are
2 “plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
3 *Service*, 572 F.3d 962, 969 (9th Cir. 2009).

4 **IX. Plaintiff’s First Claim Should be Dismissed**

5 Plaintiff asserts a claim against Whitfield under 18 U.S.C. § 2333, which permits
6 United States nationals to sue a “person” for damages if they “have been . . . injured by
7 reason of an act of international terrorism.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 478
8 (2023). Liability rests on “any person who aids and abets, by knowingly providing
9 substantial assistance, or who conspires with the person who committed such an act of
10 international terrorism.” 18 U.S.C. §2333(d)(2). A “person” for purposes of § 2333(d)(1)
11 excludes the government under the Dictionary Act’s (1 U.S.C. § 1) definition of person.
12 The exclusion of the government from the list of persons implies that Congress did not
13 intend to include the government absent some affirmative showing of statutory intent
14 to the contrary. *Return Mail, Inc. v. United States Postal Serv.*, 587 U.S. 618, 627 (2019).

15 Here, plaintiff fails to allege any of the elements of the claim against Whitfield.
16 First, Whitfield, as an employee of a state government, cannot be a person who can be
17 held liable under § 2333. Second, plaintiff does not allege a cognizable injury traceable
18 to Hamas. Third, plaintiff does not allege any facts that Whitfield, either officially or
19 individually, aided and abetted a terrorist organization. The claim must be dismissed
20 with prejudice.

21 **X. Plaintiff’s Second Claim Should be Dismissed**

22 Plaintiff fails to allege sufficient facts to make out a claim that Whitfield violated
23 his Equal Protection rights. For plaintiff to state a claim under 42 U.S.C. § 1983 for a
24 violation of his Equal Protection rights under the Fourteenth Amendment, he must
25 show that Whitfield acted with an intent or purpose to discriminate against him based
26 upon membership in a protected class. *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th
27 Cir. 2013).

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1 Plaintiff does not allege any discriminatory intent on Whitfield's part. Nor does
 2 plaintiff allege the government action that Whitfield took against him. He only alleges
 3 that he was denied educational services, which is clearly contradicted since he says that
 4 he continues to be a student and enrolled in classes. As such, plaintiff fails to state a
 5 claim against Whitfield and the claim should be dismissed.

6 **XI. Plaintiff's Third, Fourth, Seventh, and Twelfth Claims Should be
 7 Dismissed**

8 As to Whitfield, plaintiff cannot maintain his action against him under Title VI
 9 of the Civil Rights Act of 1964 (Third Claim), or under § 1983, which is a repackaged
 10 version of his Title VI claim (Fourth Claim), or under § 1983, which alleges adverse
 11 employment action based on speech (Seventh Claim), or under Title VII of the Civil
 12 Rights Act of 1964 (Twelfth Claim) because Whitfield is not plaintiff's employer who
 13 received federal financial assistance.

14 Title VI provides: "No person in the United States shall, on the ground of race,
 15 color, or national origin, be excluded from participation in, be denied the benefits of, or
 16 be subjected to discrimination under any program or activity receiving Federal financial
 17 assistance." 42 U.S.C. § 2000d. "In a Title VI claim, the proper defendant is the entity
 18 receiving federal funds, not the employees who are employed by the entity." *Drawsand*
 19 *v. F.F. Properties, L.L.P.*, 866 F. Supp. 2d 1110, 1122 (N.D. Cal. 2011).

20 "In order to state a claim against a government *employer* for violation of the First
 21 Amendment, an employee must show (1) that he or she engaged in protected speech;
 22 (2) that the employer took adverse employment action; and (3) that his or her speech
 23 was a substantial or motivating factor for the adverse employment action." *Flesch v.*
 24 *Cnty. of Lake*, 2021 WL 3633835, at *4 (N.D. Cal. Aug. 17, 2021) (emphasis in original,
 25 internal citations and quotations omitted).

26 Whitfield is not a recipient of Federal financial assistance. He is also not
 27 plaintiff's employer. Finally, plaintiff cannot maintain his action against Whitfield

1 under Title VII because he is not plaintiff's employer. *Craig v. M & O Agencies, Inc.*,
 2 496 F.3d 1047, 1058 (9th Cir. 2007). Thus, these claims must be dismissed with
 3 prejudice.

4 **XII. Plaintiff's Fifth Claim Should be Dismissed**

5 Under § 1983, a plaintiff must show: "(1) a violation of rights protected by the
 6 Constitution or created by federal statute (2) proximately caused (3) by conduct of a
 7 'person' (4) acting under color of state law." *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th
 8 Cir. 1991). In an action alleging ratification by a supervisor, "supervisors can be held
 9 liable for: (1) their own culpable action or inaction in the training, supervision, or control
 10 of subordinates; (2) their acquiescence in the complained-of constitutional deprivation;
 11 and (3) conduct that showed a reckless or callous indifference to the rights of others."

12 *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000). Further,

13 [i]n limited circumstances a supervisor's subsequent
 14 "ratification" of another's conduct can form the basis for
 15 liability under § 1983. The decision to ratify specific conduct,
 16 however, must approve both the subordinate's decision and
 the basis for it, and the ratification decision must be the
 product of a conscious, affirmative, choice to ratify the conduct
 in question. It must be a decision to ratify unconstitutional
 conduct.

17 *Peschel v. City of Missoula*, 686 F.Supp.2d 1092, 1102 (D. Mont. 2009).

18 Plaintiff fails to allege a constitutional violation that Whitfield ratified
 19 expressly. Plaintiff complains that protesters exercising their constitutional rights
 20 caused a risk of serious harm, embarrassment, and humiliation to him. ¶322. Yet this
 21 speculation and feelings he experienced do not amount to a constitutional concern.
 22 This claim must be dismissed.

23 **XIII. Plaintiff's Sixth Claim Should be Dismissed**

24 Plaintiff fails to make out a claim against Whitfield for a deprivation of his free
 25 exercise rights under § 1983. Plaintiff alleges that the statements made by third parties
 26 to protest on campus prevents him from wearing his kippa openly due. ¶328. However,
 27 allegations of verbal harassment are insufficient to support a § 1983 claim if no specific
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1 injury is alleged. *Oltarzewski v. Ruggiero*, 830 F.2d 139 (9th Cir. 1987), *overruled in part on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008). Here, 2 plaintiff does not allege that Whitfield prevented him from wearing his kippa. Rather, 3 he claims that the speech of third parties protesting on campus caused him to cover up. 4 Because there is no causal connection between Whitfield’s action and a violation of a 5 plaintiff’s rights, the claim should be dismissed.

6

7 **XIV. Plaintiff’s Seventh Claim Should be Dismissed**

8 Plaintiff fails to state a claim against Whitfield for retaliation based on his speech
9 under § 1983. A First Amendment retaliation claim requires that he show that: (1) he
10 was engaged in a constitutionally protected activity, (2) the defendant’s actions would
11 chill a person of ordinary firmness from continuing to engage in the protected activity
12 and (3) the protected activity was a substantial or motivating factor in the defendant’s
13 conduct. *O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016). Here, plaintiff fails to allege
14 that he was engaged in a constitutionally protected activity that Whitfield’s action
15 chilled. The claim should be dismissed.

16

17 **XV. Plaintiff’s Eighth Claim Should be Dismissed**

18 Plaintiff fails to state a claim under § 1983 for violation of his First Amendment
19 right against compelled speech. Plaintiff claims he is being forced to support or
20 otherwise agree with UNLV’s policies as a condition of employment and enrollment.
¶ 353. Yet he does not identify the specific policy he claims is at issue. Nor does he allege
21 any facts specific to Whitfield. This claim should be dismissed.

22

23 **XVI. Plaintiff’s Ninth Claim Should be Dismissed**

24 Plaintiff fails to allege facts against Whitfield to make out a prima facie claim of
25 Intentional Infliction of Emotional Distress. The claim requires: “(1) extreme and
26 outrageous conduct by the defendant with the intention of causing, or reckless disregard
27 of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or
extreme emotional distress; and (3) actual and proximate causation of the emotional

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1 distress by the defendant's outrageous conduct." *Avina v. United States*, 681 F.3d 1127,
2 1131 (9th Cir. 2012), see also *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (Nev.
3 1981) (stating identical elements for this claim under Nevada state law). Plaintiff
4 alleges no facts against Whitfield to state a claim. It should be dismissed

5 **XVII. Plaintiff's Tenth and Eleventh Claims Should be Dismissed**

6 To state a claim for negligent hiring, retention or supervision, a plaintiff must
7 show that the defendant owed plaintiff a duty of care, that defendant breached the duty
8 by the hiring, retaining, and/or supervising an employee even though the defendant
9 knew, or should have known, of the employee's dangerous propensities, and that this
10 breach caused plaintiff's injuries that resulted in damages. *Hall v. SSF, Inc.*, 112 Nev.
11 1384, 1391-92, 930 P.2d 94, 98-99 (Nev. 1996). An employer has a duty to use reasonable
12 care in the training, supervision, and retention of their employees to make sure that the
13 employees are fit for their positions. *Id.* These claims may only be brought against an
14 employer. *Id.* Again, Whitfield is not an employer and plaintiff does not allege any facts
15 to the contrary. This claim should be dismissed.

16 If the Court dismisses all federal claims against Whitfield, then the Court should
17 also decline to exercise supplemental jurisdiction over plaintiff's state law claims.
18 *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); 28 U.S.C. § 1337(c)(3).

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XVIII. Conclusion

Plaintiff failed to timely serve Whitfield with process. Even if he had, this case should be dismissed because (1) Whitfield is entitled to Eleventh Amendment Immunity; (2) Whitfield is entitled to qualified immunity; (3) plaintiff lacks standing to bring his claims against Whitfield; and (4) plaintiff failed to allege sufficient facts against Whitfield to state a claim. As such, Whitfield requests that the Court enter an order dismissing this case against him.

Dated September 18, 2024.

/s/ Andrew D. Smith

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1 Certificate of Service

2 I certify that, on the date and time of the electronic service, a copy of the
3 foregoing *Defendant Keith Whitfield's Motion to Dismiss* was sent via electronic means
4 through CM/ECF to the following at their last known email addresses:

- 5 • **Sigal Chattah**
6 Chattahlaw@gmail.com
7 • **Joseph S. Gilbert**
8 joey@joeygilbertlaw.com,carla@joeygilbertlaw.com,alisha@joeygilbertlaw.com,
9 • nancy@joeygilbertlaw.com

10 Dated September 18, 2024.

11 /s/ Sheena M. Imes
12 An employee of the Office of General Counsel
13 University of Nevada, Las Vegas

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